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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2371 OF 2005

1. Mr. Rajiv Kumar Gupta, s/o.)
Late Shri Satyapal Gupta.)

2. Mr. Piyush Kumar Gupta, s/o.)
Late Shri Srikishan Gupta)

3. Mr. Satyanarayan Gupta, s/o.)
Surajmal)

All of them having their office)
at Delhi and also at Building)
No.B/3, Godown No.4, Arya)
Compound, Anjur Road, Rahnal)
Bhiwandi - 421 302.) ... Petitioners

Versus

The State of Maharashtra)
(At the instance of Inspector of)
Police, Narpolice Police Station)
Bhiwandi, Dist. Thane.) ... Respondent

Mr. N.K. Thakore with Mr. Prakash Naik for the petitioners.

Mr. S.R. Borulkar, Public Prosecutor with Ms. P.H. Kantharia, A.P.P. for the State.

CORAM: SMT. RANJANA DESAI &
ANOOP V. MOHTA, JJ.

DATED: 28TH OCTOBER 2005.

ORAL JUDGMENT : (Per Anoop V. Mohta, J.)

1. The petitioners are the directors of a company called "Dharampal Satyapal Limited" (for short, "the said Company") incorporated under the provisions of the Companies Act, having its main office at Delhi and Godown/office at Anjur Road, Rahnal Bhiwandi, Thane. The said Company is the manufacturer of panmasala and is

selling the same under the brand name "Rajnigandha" all over India.

2. The controversy in the present writ petition revolves around the panmasala "Rajnigandha". The Government of Maharashtra by its Notification published in the official gazettee dated 23/7/2002 banned distribution and the sale of panmasala in the State of Maharashtra for a period of five years from 1/8/2002. The Hon'ble Supreme Court of India by its judgment in **Godawat Pan Masala Products I.P. Ltd. & Anr. v. Union of India & Ors., JT 2004 (6) SC 179** struck down the said Notification. The State of Maharashtra, thereafter by an order dated 29/1/2005 have decided to permit the manufacture and sale of gutka and panmasala on certain terms and conditions and subject to provisions of the Prevention of Food Adulteration Act, 1954 (for short, the Food Adulteration Act") and the Prevention of Food Adulteration Rules, 1955 (for short, "the said Rules") and such other connected provisions.

3. The Joint Commissioner of Food & Drug Administration (for short, "the Food (Health) Authority"), appointed by the Government of Maharashtra, controls grant the permission and/or licence to manufacture and/or sale of such panmasala like "Rajnigandha" in Maharashtra. The said Company, therefore, by an application dated 28/2/2005 applied to the Joint Commissioner of Food & Drug Administration for permission to sell their product "Rajnigandha" in the State of Maharashtra.

4. As per the requirement of the Food Adulteration Act and the Rules made thereunder, the Company have submitted the labels for approval, in terms of the order of the Joint Commissioner, Food & Drug Administration and the Food (Health) Authority for the State of Maharashtra. The ingredients of "Rajnigandha" panmasala, in each 100 grams, has been submitted. It has been mentioned in the said application that the product in question does not contain any added magnesium carbonate. It has also been asserted that they have not added any magnesium carbonate. The main ingredients of the said "Rajnigandha" panmasala are; Beatelnut (Supari), Katha (Catechu), Chuna (Lima), Cardamom (Elaichi) and permitted Flavours. The said ingredients are also mentioned and advertised on their labels, cartons and such other materials.

5. The Joint Commissioner, Food & Drug Administration, by its letter dated 1/3/2005, based on the said application dated 28/2/2005 has permitted the said Company to sell their product "Rajnigandha" panmasala subject to the conditions as contemplated in the Food Adulteration Act and the Rules made thereunder. The said Company since then has been selling the said product in the State of Maharashtra through various distributors/sellers.

6. On 21/7/2005, the Food Inspector Mr. K.V. Sanke, working under the Joint Commissioner of Food, State of Maharashtra, visited the godown of the said Company at Bhiwandi, after giving notice to the nominee of the Company - Mr. Ghosh, as contemplated under section 14(a) of the Food Adulteration Act and seized the samples of "Rajnigandha" panmasala from different lots under panchnama and asked them not to deal with the stock lying in the godown till further orders. Later on, the entire stock of "Rajnigandha" panmasala lying in the said godown have been seized. The samples were sent to the laboratory at Pune for analysing and testing. The public analyst report opined the existence of magnesium carbonate to the extent of 1.26%, 1.26 to 1.35%.

7. The Food Inspector of Joint Commissioner, Konkan Division, Food & Drug Administration (the complainant), therefore, lodged the complaint dated 18/8/2005 to the Senior Inspector of Police, Narpoli Police Station, District Thane, against the owner of "Rajnigandha" panmasala - M/s. Dharampal Satyapal Limited and its directors and its nominee under the Food Adulteration Act and the said Rules made thereunder, inter alia, complaining that the "Rajnigandha" panmasala of the said Company contains magnesium carbonate. According to them, the magnesium carbonate has been added in the "Rajnigandha" panmasala as per the ratio mentioned in the complaint. It has been averred that the said Company in newspapers English Daily "Indian Express" and in Marathi

Daily "Lokmat" had advertised that - "Rajnigandha does not contain any magnesium carbonate" and "the sale of Rajnigandha panmasala is permissible in Maharashtra". As the Commissioner of Food (Health) Authority, Food & Drug Administration, Mumbai, has put a ban on manufacture, stocking and sale of gutka and panmasala containing magnesium carbonate, such advertisement by the said Company amounts to giving false information and misleading the public. Therefore, the complaint has been filed under sections 2(a), (h)(i) and (v) of the Food Adulteration Act and Rule 43-A of the said Rules made thereunder. They have also invoked sections 272, 273 and 420 of the Indian Penal Code (for short, "the IPC") against the manufacturer of "Rajnigandha" flavoured panmasala.

8. The nominee of the said Company Mr. Ghosh, therefore, moved an application under section 43(8) of the Criminal Procedure Code (for short, "the Code") for bail. The same was granted. However, he could not comply with the conditions of the bail order. He was arrested on 16/9/2005. He was in police custody till he was released on bail on 20/9/2005. The petitioners, as alleged, having learnt from Mr. Ghosh that during his interrogation, it was directed to send intimation to the petitioners/directors to surrender before the Inspector of Police, Narpoli Police Station and being apprehensive of their arrest, have invoked Article 226 of the Constitution of India and prayed restrictively, to quash

the charges levelled against them under the FIR under sections 272, 273 and 420 of the IPC by filing the present Criminal Writ Petition dated 27/9/2005.

9. The relevant prayer clause is as under :

> "(a)this Hon'ble Court do invoke writ jurisdiction under Article 226 of the Constitution of India and issue writ of mandamus or any other writ in the nature of mandamus and may please quash and set aside the FIR lodged by Joint Commissioner, Food, Government of Maharashtra under section 272, 273 and 420 of IPC with Inspector of Police Narpoli Police Station, Bhiwandi and registered under CR No.1203 of 2005 against the Petitioners."

10. We have heard Mr. Thakore, the learned counsel appearing for the petitioners and Mr. S.R. Borulkar, the learned public prosecutor along with Ms. P.H. Kantharia, A.P.P. appearing for the State. Rule made returnable forthwith. By consent of the parties, heard finally.

11. The prayer clause reproduced above and as submitted by Mr. Thakore, the learned counsel for the petitioners, the admitted position is that the petitioners have prayed

to quash and set aside the FIR and proceedings partly in respect of CR No.1203 of 2005 registered with the Inspector of Police, Narpoli Police Station, Bhiwandi, Thane. There is a positive assertion with the prayer to quash and set aside the FIR in respect of sections 272, 273 and 420 of the IPC. It means that the averments as made by the Complainant in reference to breaches of the various provisions of the Food Adulteration Act and the said Rules made thereunder, at present, remain unchallenged.

12. The positive assertion and the submission made by the counsel for the petitioners, of restrictive challenge as referred above have been opposed by the learned public prosecutor by submitting that there is no question, at this stage, to split the FIR and to quash and set aside the FIR. Such bifurcation is impermissible specially at this stage of the proceedings. The averment as referred to above in the complaint, prima facie needs a detailed investigation. It will be incorrect for the police to proceed only in reference to the breaches of the provisions of the Food Adulteration Act and not under section 420 of the IPC. We are also convinced on this sole ground itself that no case has been made out by the petitioners to split and quash and set aside the FIR in part, only in reference to section 420 of the IPC. In view of this undisputed position on record and specially the restricted prayer as sought, we are of the view that

it cannot be granted, at this stage in such matter, affecting the people at large.

13. The contentions of the learned counsel for the petitioners need to be decided on the above foundation. This half-hearted challenge by the petitioners affects the submission on merits of the FIR in question, at this stage. There is no dispute about the existence and the trace of the magnesium carbonate in those seized samples. The debate is the said magnesium carbonate found in those samples is nothing but a chemical reaction of the existing ingredients of the panmasala "Rajnigandha". Those ingredients as referred above itself form the said magnesium carbonate, automatically. The learned counsel, therefore, contended that as they have not added the said magnesium carbonate, they have not breached any provisions of the Food Adulteration Act. Even if some traces of magnesium carbonate found in those samples of panmasala "Rajnigandha", yet it was within the prescribed limits of 2.0%, as specified under said Adulteration Rule 62. This aspect, therefore, cannot be the foundation to invoke the provisions of section 420 of the IPC. He further contended that in **Godawat Pan Masala's case (supra)**, the Apex Court has already declared that the State Government has no authority and jurisdiction to ban such panmasala in Maharashtra and, therefore, in view of this declaration by the Supreme Court, there is no question of filing such complaint against the petitioners. He further relied on various paragraphs of

the said judgment and contended that even if some trace of magnesium carbonate has been found, that itself cannot be injurious to the health of the consumers.

14. We are not impressed by this submission and as rightly contended by the learned public prosecutor that the averment involving section 420 of the IPC in the present case has a foundation because of positive assertion made by the petitioners. Firstly, by submitting an application along with their labels and details of ingredients of panmasala "Rajnigandha" dated 28/2/2005, wherein apart from the ingredients, there is a positive statement that "there is no added magnesium carbonate in the said product". The Food (Health) Authorities thereafter, based on the said averments, by its order dated 1/3/2005, have granted the permission to the Company to sell the panmasala "Rajnigandha" in Maharashtra. But, on information as they raided the godown, they found and later on it was confirmed by the experts that the said "Rajnigandha" panmasala contains magnesium carbonate to the extent of 1.26% to 1.35%. Prima facie, it appears that the petitioners and the Company with this approach, in fact, have misdirected and misled the Department itself while submitting the label along with the application for licence to sell the product in Maharashtra. There is no reference about the existence of such magnesium carbonate in the said application. Secondly, in the newspaper advertisements dated 18/8/2005 in the English Daily "Indian Express" and

Marathi Daily "Lokmat", gave positive averment and representation to the people at large that the "Rajnigandha" panmasala does not contain the magnesium carbonate. The ingredients of the "Rajnigandha" panmasala have also been advertised accordingly. The people at large, impressed by this advertisement are likely to purchase the panamasala "Rajnigandha". This positive representation by the said Company, if taken note of, on the face of record and without going to the intention behind such advertisement, a prima facie case has been made out by the Department to investigate the matter fully. We cannot ignore it, at this stage, because this is a question of health of public at large also.

15. The learned public prosecutor has relied on paragraph 43 of the Supreme Court judgment in **Godawat Pan Masala's case (supra)**, which refers to the submissions of the petitioners "Rajnigandha " panmasala, which is reproduced as under:

> "Assuming that traces of magnesium carbonate were to be formed during consumption of the product along with lime, the exercise of power should have been restricted to banning pan masala containing magnesium carbonate and not wholesale banning of pan masala, irrespective of the content of magnesium carbonate."

16. The petitioners' counsel has also relied following portion of the same para.

> "He therefore contended that magnesium carbonate is not per se injurious to health for otherwise it would never have been permitted in any article of food. There is no material on the basis of which it can be demonstrated that the very same magnesium carbonate would become injurious to health if it arises on account of mixing of traces of magnesium in arecanut and carbonate in lime. According to the learned counsel, this is a clear case of non-application of mind, notwithstanding the medical research papers and data made available in the affidavit filed by the State Government."

17. The public prosecutor has further referred to paragraph 44 of the said judgment and pointed out that, at that time, it was not the case of the State Government that "Rajnigandha" panmasala itself contains magnesium carbonate and, therefore, it was observed by the Apex Court that there was no demonstrated danger to the public health by magnesium carbonate by consumption of "Rajnigandha" panmasala and even if there were, the prohibition could only have extended to panmasala containing magnesium carbonate. He, therefore, contended

that at this stage, the undisputed position of trace of magnesium carbonate in the "Rajnigandha" panmasala itself sufficient to proceed with the investigation.

18. The learned counsel appearing for the petitioners, however, opposed this contention and pointed out that what is relied upon by the public prosecutor are only the submissions and they cannot be taken note of, at this stage, as the Supreme Court has, in fact, quashed and set aside the Notification banning the panmasala by the said judgment. He referred to and relied on various other paragraphs of the **Godawat panmasala judgment (supra)** of the Supreme Court in support of his contention. We are not going to that controversy, at this stage, as admittedly the petitioners themselves have not challenged the entire FIR and specially the reference to the provisions of the Food Adulteration Act and the Rules. The present challenge is restricted to section 420 of the IPC and not to the provisions of the Food Adulteration Act. All these controversial issues are in respect of automatic formation of magnesium carbonate. In this writ petition, it is difficult to opine anything on this controversy without perusing the experts opinion. All these points will have therefore to be kept open for the parties to deal with at the appropriate stage.

19. The contention in respect of "vicarious liability" have been argued, based on the recent judgment of the Supreme Court in **S.M.S. Pharmaceuticals Ltd. v. Neeta**

(2005) 8 S.C.C. 89, wherein, the Supreme Court while dealing with the provisions of the Negotiable Instruments Act in reference to the "offence by the company" and or liability of the company and its directors, on reference,

has observed as under :

> "(a) whether for purposes of Section 141 of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfill the requirements of the said section and it is not necessary to specifically state in the complaint that the persons accused was in charge of, or responsible for, the conduct of the business of the company.
>
> (b) whether a director of a company would be deemed to be in charge of, and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.
>
> (c) even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the Managing Directors of Joint Managing Director who admittedly

would be in charge of the company and responsible to the company for conduct of its business could be proceeded against".

20. The basic ingredients, therefore, which are required to be considered in such complaint are that the person accused of must be in charge of and responsible for the conduct of the business of the company at the relevant time and there must be a positive averment in this regard. In the present case as noted above, the averments are not only against the said Company but also against the petitioners/directors. There are averments that "Dharampal Satyapal Limited" have published advertisements as above giving false information and misled the public. The further averments are specifically against the petitioners/directors and the nominee of the said Company. Those averments are -

"Therefore, this complaint is filed u/s. 2(a), (h)(i) and (v) of the Food Adulteration (Prevention) Act, 1954 under Rule 43-A of the Rules, 1955 under the said Act and under Sections 272, 273 and 420 of Criminal Procedure Code against the manufacturer of said Rajnigandha Flavoured Pan Masala, M/s. Dharampal Satyapal Ltd. Company and the Company's Directors, R/O. 2/50, S.D.A, New Delhi - 110 016, (2) Shri Satyanarayan Gupta, R/o. 43/1, Rajpur

Road, Delhi - 110 054, (3) Shri Piyush Kumar Shrikishan Gupta, R/O. 43/1, Rajpur Road, Delhi - 110 054 and (4 Shri Pradipkumar Ganesh Ghosh (Seller, Godown-in-charge, Nominee) R/o. B3/4 Rahnaj Bhiwandi Arya Compound, Bhiwandi, who inspite of a ban put by the Commissioner, Food and Drugs Administration, M.S., Mumbai, to manufacture, stock and sell Gutka and Pan Masala containing Magnesium Carbonate, manufactured Rajnigandha Pan Masala which contains Magnesium Carbonate which is injurious to public health and stocks and sold the same and who also published advertisements in the Indian Express, English Daily and Lokmat, Marathi Daily stating therein that Rajnigandha Pan Masala does not contain Magnesium Carbonate and that permission is given for its sale in Maharashtra, thereby misleading and deceiving the public."

21. The public prosecutor, therefore, contended that these averments are sufficient, at this stage, to investigate the matter further even against the directors. He further contended that if the same averments are sufficient to consider the offences under the Food Adulteration Act then, it is difficult to quash

the averments at this stage pertaining to section 420 of the IPC. Prima facie, it appears to us that the positive assertion in the newspapers dated 18/8/2005 by the said Company and similar contentions and averments in application which was filed on 28/2/2005 for grant of licence by the said Company prima facie cannot be said to be without the knowledge and/or without the permission of the directors or such other officers of the Company.

22. The public prosecutor relied on section 17(4) of the Food Adulteration Act and contended that, at this stage, it cannot be said that there was no connivance and/or no knowledge to the petitioners/directorts about the permission, procedure and advertisements. He rightly contended that it is difficult to believe without due investigation, that the directors were unaware of those facts. We have also noted that there are no such averments made in the petition in reference to this. The submission was that there are no specific and positive allegations against the directors that they were in charge of and/or responsible for the conduct of the business of the company. This according to us, also needs detailed investigation and trial. Therefore, the Supreme Court's judgment in **R. Banerjee & Ors. v. H.D. Dubey & Ors., AIR 1992 SC 1168,** can be of no help to the petitioners at this stage.

23. The contention of mala fide action of respondent 2 in lodging the complaint against the petitioners and the

Company by invoking section 420 of the IPC is also difficult to accept. There are no positive averments made of mala fide action against the Department and/or any officers. On the contrary, at this stage, the complaint lodged is based on the chemical analyser's report. The positive averments made by the Company that the panmasala "Rajnigandha" does not contain magnesium carbonate appears to be incorrect. There is some substance in the complaint as lodged by the complainant - Inspector of Food Department. Assuming for a moment that, at the relevant time, the permission was granted to sell such product in Maharashtra, that itself cannot be the reason to overlook the complaint that after collecting the positive report, the Department found that the panmasala contains magnesium carbonate, which according to them, was never permitted to be added in the panmasala. The existence of the said magnesium carbonate itself is in breach of the provisions of the Food Adulteration Act and Rules. It is difficult for us to overlook it and interfere with the investigation, which they have invoked by filing the present complaint against the petitioners/directors and the Company.

24. It cannot be said that there is any abuse of process of law as sought to be contended. On the contrary, this will be in the interest of public at large that there should be a proper investigation of such issues as early as possible. The learned counsel for the petitioners has also relied on the Supreme Court judgment in **Ajay Mitra**

v. State of M.P. and others, AIR 2003 SC 1069 to support his case of quashing the FIR in reference to section 420 of the IPC only. Prima facie, it is difficult to accept the contention that there was no mens rea, firstly, because as the petitioners have submitted their application for grant of approval of the labels with specific averments of no magnesium carbonate and secondly, by advertising the product with positive averment that it does not contain any magnesium carbonate. The Department found all these averments wrong and incorrect. It is difficult to accept the contention that the FIR as filed does not allege or disclose the essential requirement of penal provisions and/or prima facia material to form the foundation or constitute the starting point of a lawful investigation. The facts in **Ajay Mitra's case (supra)**, therefore, are totally distinct and distinguishable and, hence, it is not applicable to the present case.

25. The uncontroverted allegations made in the FIR and/or complaint and the evidence collected in support of the same cannot be overlooked, at this stage. In view of the allegations made in the complaint, the matter requires investigation. It is difficult to quash the proceedings as prayed. In view of this, the judgment of the Apex Court in **M/s. Pepsi Foods Ltd. and another v. Special Judicial Magistrate and others, 1998 SC 128** whereby in the facts and circumstances of the case, the court had quashed and set aside the complaint, does not

help the petitioners. There is no dispute that the High Court can exercise the power of judicial review in criminal matters under Article 226 of the Constitution of India but it is not as a matter of course. In the present case, no case is made out for quashing the FIR in respect of section 420 of the IPC. Moreover, the restricted prayer itself means that further investigation can proceed in respect of other offences under the Food Adulteration Act, based on the same averments. Therefore, this is not a fit case where this court should interfere with the investigation by invoking "doctrine of judicial review".

26. The learned counsel further contended that by invoking the provisions of the IPC like sections 272, 273 and 420, it amounts to exceeding their power and jurisdiction as the Food Adulteration Act and the said Rules made thereunder nowhere give them such authority to launch prosecution under the IPC. The learned counsel is, however, unable to submit any supporting foundation to this proposition. There is no bar under the Food Adulteration Act and the said Rules made thereunder that the concerned authorities under the Act have no jurisdiction and/or authority to prosecute the guilty person for the offences under the IPC based on the same averments along with the provisions of the special statutes. All such authorities have jurisdiction to launch a prosecution by invoking various provisions of the IPC, along with the special statutes.

27. Taking all into account, we are of the view that there is no case made out by the petitioners to quash and set aside the FIR registered under CR No.1203 of 2005 against the petitioners. The petition is, therefore, dismissed.

(SMT. RANJANA DESAI, J.)

(ANOOP V. MOHTA, J.)